Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
THE TENNIS CHANNEL, INC.	)	MB Docket No. 10-204
	)	File No. CSR-8258-P
v.	)	
	)	
COMCAST CABLE COMMUNICATIONS, LLC	)	

To: The Commission

OPPOSITION TO COMCAST'S CONDITIONAL PETITION FOR STAY

Stephen A. Weiswasser
C. William Phillips
Paul W. Schmidt
Robert M. Sherman
Leah E. Pogoriler
Elizabeth H. Canter
Neema D. Trivedi
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-6000

Counsel to The Tennis Channel, Inc.

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REDACTED VERSION

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SUMMARY

In 2009, The Tennis Channel, Inc. ("Tennis Channel") asked Comcast Cable Communications, LLC ("Comcast") to carry it on terms that fairly reflected the material improvements it has made in its quality and service since its carriage on Comcast systems began, and that were consistent with the broader distribution that Comcast afforded to similarly situated networks that it owned. To date, Comcast has refused to provide Tennis Channel with the fair carriage its performance merits, instead continuing to discriminate against Tennis Channel by providing it with materially poorer terms of carriage than the [redacted] carriage it provides to its similarly-situated sports channels, Golf Channel and Versus. Comcast also continues to provide discriminatorily favorable carriage to other affiliated sports networks as it acquires equity in them.

The Presiding Judge and the Commission's Enforcement Bureau have now found, following a full hearing, that Comcast is discriminating against Tennis Channel in violation of Section 616. The Presiding Judge found that Comcast's discriminatory treatment of the network unreasonably restrains its ability to compete, and he ordered that Comcast stop discriminating "as soon as practicable." Rather than comply with that directive, and despite the repeated findings that it has violated the law, Comcast asks the Commission to sanction further discrimination while Comcast pursues a legal attack that does not so much challenge the application of Section 616 in this circumstance as it does the Commission's very authority to regulate program carriage discrimination. Tennis Channel respectfully requests that the Commission reject that request — which is inconsistent with the foundational purposes of Section 616 and unjustified on these facts — and instead order Comcast to comply with the Initial Decision's appropriate carriage and channel placement remedies now.

Comcast first contends that the Administrative Procedure Act ("APA") requires a stay — arguing that it is unlawful for the Commission to allow *any* staff order under delegated authority to become effective unless the full Commission first approves it. That contention is contrary to established law and longstanding Commission practice. Indeed, the Commission has the authority, which it has exercised here, to make the Media Bureau's Hearing Designation Order ("HDO") and the Initial Decision effective upon release. Nothing in the APA prevents this practice — a practice that the Commission and two appellate courts have upheld. The APA provision on which Comcast relies governs the circumstances in which parties to administrative actions are entitled to judicial review, an entirely separate question from whether those actions are legally effective, and the provision does not in any event apply to this case.

Comcast's other arguments for a stay fare no better. The stay that Comcast seeks is an extraordinary form of relief that the Commission would grant only if Comcast showed that all of the following factors are "heavily tilted" in favor of its grant: (1) it is likely to succeed on the merits; (2) it would suffer irreparable injury absent a stay; (3) a stay would not substantially harm Tennis Channel; and (4) a stay would serve the public interest. Far from justifying a stay, any fair analysis of these factors only reinforces the need for prompt compliance.

First, Tennis Channel, not Comcast, is likely to succeed on the merits. Based on a careful analysis of an extensive documentary record and lengthy witness testimony, the

Presiding Judge issued a carefully-reasoned Initial Decision. That decision, which was consistent with the Media Bureau's *prima facie* findings and the Enforcement Bureau's conclusions following the hearing, concluded that Tennis Channel, Golf Channel, and Versus are similarly-situated within the meaning of Section 616, competing for viewers, advertisers, and even programming. Despite this similarity, Comcast grants below-market carriage to Tennis Channel and [redacted] carriage to Versus and Golf Channel (along with a series of other benefits not available to unaffiliated channels). The decision explicitly rejected as pretexts the justifications Comcast continues to put forward for its discrimination, all of which were undermined or contradicted by its own documents and by the substantial weight of the evidence. And the decision properly found that Comcast's discrimination seriously harms Tennis Channel's ability to compete in a number of ways, including through the loss of the [redacted] subscribers that Comcast unquestioningly grants to Versus and Golf Channel but denies to Tennis Channel, through the impact that suppressed carriage from the nation's largest provider has on Tennis Channel's ability to secure fair carriage from other MVPDs, and through its impact on Tennis Channel's competition for content and advertisers.

Comcast also contends that the Hearing Designation Order improperly resolved the question of whether Tennis Channel's complaint was timely filed and rendered it impossible for Comcast to obtain a fair hearing on its view that the complaint was not timely. But the Media Bureau properly found this to be a question of law, not fact, that was resolved readily by prior precedent and the plain language of the governing rule, and it correctly resolved the question itself. Tennis Channel filed its complaint within one month of delivering its pre-filing notice to Comcast, as specified by the rules, and within seven months of Comcast's rejection of its efforts to negotiate fair carriage. Under Section 76.1302(f)(1) of the Commission's rules and applicable Commission precedent, the complaint was timely.

As for Comcast's First Amendment argument, which the Commission in another context has called "oft-repeated (and oft-rejected)," the Initial Decision does not violate Comcast's rights. Comcast is already carrying Tennis Channel; it has already made an editorial judgment that it wants to carry tennis content — so much so, in fact, that it seeks tennis programming for Versus. Accordingly, the only interest at stake here — Comcast's financial interest in charging a discriminatory and unjustified fee to subscribers who wish to receive Tennis Channel — is not an interest that is protected by the First Amendment.

Even if the First Amendment were implicated here, the Initial Decision survives intermediate scrutiny, which is the proper test that courts and the Commission have used to evaluate this type of regulation under the First Amendment. Comcast cannot plausibly assert that the Initial Decision seeks to favor or to disfavor particular speech based on its content. And like Section 616, the Initial Decision serves important government interests and does not burden speech more than necessary to achieve those interests.

Second, Comcast has not shown that it would suffer irreparable injury absent a stay. In support of its claim that a change in Tennis Channel's carriage would cause such injury, Comcast seeks to present new evidence on that question that cannot properly be introduced now. Comcast waived a presentation of this evidence below where it would have been subject to fair

review and challenge by Tennis Channel, even though both the Complaint and the HDO made clear that this issue was to be presented to the Presiding Judge. But even if this evidence were considered, it simply establishes that compliance requires Comcast to do no more than what it does every day — adjust line-ups and modify the tiering and channel location of program services. The record is replete with examples of Comcast's ability, when it has chosen, to do precisely what it disclaims the ability to do for Tennis Channel.

Third, the absence of irreparable injury to Comcast stands in stark contrast to the ongoing harm that Tennis Channel will suffer if Comcast can continue to discriminate while it seeks review of every aspect of the Initial Decision. For nearly three years, Tennis Channel has been competitively disadvantaged by Comcast's discrimination. The Initial Decision establishes the magnitude of that harm. Section 616 as implemented does not allow Tennis Channel compensation for the effects of Comcast's past discrimination, but it requires prompt going-forward relief now that Comcast's misconduct has been adjudicated, a proposition especially true in light of the Presiding Judge's imposition on Comcast of the maximum forfeiture available to him because of the egregiousness of Comcast's actions. To delay further would perpetuate the very harm that Section 616 was enacted to prevent.

Fourth, the public interest goals that underlie the program carriage rules will continue to be disserved if Comcast is permitted to delay compliance with the law through continued litigation. Violations of the program carriage rules undermine the public's interest in diversity and competition in the video programming market. Especially in light of the import of these public interest objectives, Comcast's unsupported and self-serving statements that viewers will be harmed if Comcast allows them to receive Tennis Channel without paying an excessive and discriminatory fee fall far short of justifying the extraordinary relief of a stay.

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BACKGROUND

Tennis Channel is a national cable sports network launched in 2003, dedicated to airing tennis and tennis-related programming.[1] Two years after its launch, the network signed a carriage contract with Comcast, the nation's largest distributor. That agreement gives Comcast flexibility regarding the level of carriage to provide Tennis Channel [redacted].[2] Exercising that discretion, Comcast launched Tennis Channel on its pay-extra sports tier — a tier that reaches only [redacted] of Comcast's subscribers and on which only unaffiliated networks are carried exclusively.[3]

Comcast wholly or partly owns several sports networks, including Golf Channel and Versus, each of which it carries on its Expanded Basic/Digital Starter tier, reaching [redacted] of its subscribers.[4] Comcast has consistently guaranteed those networks [redacted] carriage and prime channel positioning since their launch, never

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1 *The Tennis Channel, Inc. v. Comcast Cable Comms., LLC*, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, MB Docket No. 10-204, File No. CSR-8258-P, 11D-01, ¶ 5 (rel. Dec. 20, 2011) [hereinafter "Initial Decision"]; Tennis Channel Ex. 14, Written Direct Testimony of Ken Solomon, ¶ 5 [hereinafter "Solomon Written Direct"].

2 Initial Decision ¶ 16; Tennis Channel Ex. 144 § 5.1.3, 6.2.1; Bond Tr. at 1985:20-1986:3. *See also* Solomon Tr. at 257:8-20; Bond Tr. at 2158:18-2159:18(acknowledging that the agreement did not specify a level of carriage, allowing the network "to grow and to move up").

3 Initial Decision ¶¶ 14, 57; Tennis Channel Ex. 130; Bond Tr. at 2012:14-2013:1, 2198:15-21, 2292:1-2293:12.

4 Initial Decision ¶¶ 12, 54; Tennis Channel Ex. 16, Written Direct Testimony of Hal Singer, ¶ 20 & tbl. 1 [hereinafter "Singer Written Direct"]; Tennis Channel Exs. 100, 131, 132; Bond Tr. at 1950:18-1951:17, 2096:8-17, 2115:21-2116:12, 2160:19-2161:21, 2120:5-2220:15.

questioning whether their performance justifies this treatment or the high cost of these networks.[5]

During the years following its launch on Comcast, Tennis Channel invested heavily in its service, obtaining rights to virtually every major tennis tournament in the world and to all four tennis Grand Slam tournaments, hiring well-recognized tennis figures as commentators, launching a high-definition service, and making other technical upgrades. After acquiring rights to the last Grand Slam, Tennis Channel in early 2009 presented a proposal to Comcast that included expanded carriage from Comcast.[6] On June 9, 2009, after protracted discussions, Comcast rejected Tennis Channel's offer, and the terms on which it was based, without making a counteroffer.[7] As the Presiding Judge recognized, Comcast's reasons for rejecting the offer were pretexts.[8]

On the basis of these and other facts established at the six-day hearing in this case, the Presiding Judge concluded that Comcast discriminates against Tennis Channel in favor of its similarly situated affiliates, Golf Channel and Versus, solely because of affiliation.[9] That

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5 Initial Decision ¶¶ 53-54, 61, 66; Tennis Channel Ex. 100; Orszag Tr. at 1300:1-5, 1300:17-22.

6 Initial Decision ¶ 19; Solomon Written Direct ¶¶ 5, 11-15, 20-21, 26-27; Tennis Channel Ex. 70; Solomon Tr. at 261:13-264:14, 267:1-271:6; Bond Tr. at 2172:17-2178:15, 2203:16-2204:3.

7 Initial Decision ¶ 23; Solomon Written Direct ¶ 28; Bond Tr. at 2128:1-14, 2215:9-11.

8 *See, e.g.*, Initial Decision ¶¶ 21-22 (characterizing Comcast's "field inquiry" as a "ploy to shore up its defense strategy"); ¶¶ 62-68 (concluding the carriage decisions of other distributors show that Comcast discriminates in favor of its networks and against Tennis Channel); ¶¶ 72-74 (rejecting Comcast's "year of launch" excuse because Comcast has granted favorable carriage to networks launched both before and after Tennis Channel); ¶¶ 75-78 (rejecting Comcast's cost-based arguments, in part because Golf Channel and Versus are significantly more expensive than Tennis Channel).

9 Initial Decision ¶ 122.

discrimination, he found, unreasonably restrains Tennis Channel's ability to compete in the cable marketplace generally, and against Golf Channel and Versus specifically, in violation of Section 616.[10] Accordingly, he ordered Comcast to cease discriminating and to afford Tennis Channel treatment equal to its own sports networks. Specifically, he required Comcast to carry Tennis Channel at the same level of carriage as and at channel positions comparable to those of Golf Channel and Versus.[11]

The Presiding Judge's decision is consistent with the Enforcement Bureau's post-hearing recommendation that Comcast be assessed the maximum fine allowable for willfully violating Section 616. It is also consistent with the Commission's recent recognition in its Comcast-NBC Merger Order, based on the very Comcast channels at issue in this matter, that "Comcast may have in the past discriminated in program access and carriage in favor of affiliated networks for anticompetitive reasons."[12]

Despite the fact that Section 616 requires expedited action on complaints filed pursuant to it,[13] that the program carriage rules and the HDO expressly provide for the Initial Decision to "become effective upon release,"[14] and that the Initial Decision recognized the need

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10 *Id.* ¶ 123.

11 *Id.* ¶¶ 119-21, 126-27.

12 *See Applications of Comcast Corp., General Elec. Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Mem. Op. & Order, MB Docket No. 10-56, ¶ 117, Tech. App. ¶¶ 65-71 (FCC rel. Jan. 20, 2011) [hereinafter "*NBCU Order*"].

13 *See* 47 U.S.C. § 536(a)(4).

14 47 C.F.R. §§ 76.1302(g)(1) (citations are to the version of the regulation in effect when this case began; the relevant language has not changed); *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, MB Docket No. 10-204, File No. CSR-8258-P, DA 10-1918, ¶ 23 n.119 (rel. Oct. 5, 2010) [hereinafter "HDO"]).

for remediation "as soon as practicable,"[15] Comcast now seeks the Commission's permission to continue violating the law, and it has refused to comply with the Initial Decision until it exhausts what appears to be an extended appeals strategy. Thus, it has opposed the Petition to Compel Compliance that Tennis Channel has been forced to file, and it has filed this alternate Conditional Petition for Stay.[16]

ARGUMENT

Two years after Tennis Channel invoked program carriage rules that are intended to provide prompt relief, and after the Presiding Judge to whom the Commission delegated this case has found willful discrimination (supported by the same finding of the Enforcement Bureau), Comcast still seeks to delay ending its discrimination. But Comcast has failed to justify the stay it seeks while it continues to litigate this matter. Its Administrative Procedure Act ("APA") argument misreads the statute and the law applying it, and the argument would fundamentally undermine the Commission's ability to carry out its mission. Moreover, the interests that must be considered in justifying a stay, far from being "heavily tilted" in favor of a stay,[17] instead point directly to the importance of Comcast's prompt compliance with the Presiding Judge's equal treatment remedy. In short, the Commission should deny Comcast's request and instead order Comcast to comply fully and promptly with the Initial Decision's equal treatment remedy.

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15 Initial Decision ¶ 127.

16 *See* Opposition to Tennis Channel's Petition to Compel Comcast's Compliance with Initial Decision, at 11 (Jan. 25, 2012); Comcast's Conditional Petition for Stay, at 11 (Jan. 25, 2012) [hereinafter "Stay Petition"].

17 *See Implementation of Video Description of Video Programming*, 17 FCC Rcd. 6175, 6177 ¶ 6 (2002).

I. REQUIRING COMCAST TO REMEDY ITS DISCRIMINATION PENDING COMMISSION REVIEW IS CONSISTENT WITH THE ADMINISTRATIVE PROCEDURE ACT.

The HDO and the Commission's rules expressly provide that the remedy ordered in the Initial Decision became effective upon release.[18] Section 10(c) of the APA does not require otherwise. Comcast argues that under this provision, the Initial Decision must remain inoperative pending Commission review,[19] but this argument misreads the APA. The section on which Comcast relies[20] relates only to whether and when an agency action is reviewable in court; it does not in terms or effect purport to limit the agency's ability to take immediately effective action through delegated authority.[21] Comcast's contrary reading is unsupported by law and would undermine not just the program carriage rules, which make Initial Decisions effective upon release, but the entire basis on which the Commission conducts its day-to-day business.

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[18] *See* 47 C.F.R. §§ 76.10(c)(2), 76.1302(g)(1); HDO ¶ 23 n.119. Because the Initial Decision can be read only as complying with the mandate in the Commission's rules and the HDO requiring effectiveness upon release, *see* Initial Decision ¶ 127, Comcast's claim that Tennis Channel is filing an "exception" to the Initial Decision or seeking alteration of its terms, *see* Opposition to Tennis Channel's Petition to Compel Comcast's Compliance with Initial Decision at 4-5 & nn.9-10, is unfounded.

Recognizing these rules, the Enforcement Bureau recently filed comments urging that "carriage in the manner specified in the [Initial Decision] should commence immediately." Enforcement Bureau's Comments on Tennis Channel's Petition to Compel Comcast's Compliance with Initial Decision, ¶ 3 (Jan. 25, 2012).

[19] Stay Petition at 7; Opposition to Tennis Channel's Petition to Compel Comcast's Compliance with Initial Decision at 9-12.

[20] Comcast makes the same APA argument in both its Stay Petition and its Opposition to Tennis Channel's Petition to Compel Comcast's Compliance with Initial Decision. Tennis Channel's response herein applies to both of Comcast's pleadings on this subject. Notably, in its Application for Review, Comcast failed to seek review of the Media Bureau's ruling that the Initial Decision "will become effective upon release and will remain in effect pending appeal," HDO ¶ 23 n.119.

[21] *See* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . . Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes (continued...)

The Commission and two appellate courts already have rejected challenges like the one Comcast raises here. First, the U.S. Court of Appeals for the D.C. Circuit examined and upheld an FCC rule providing, like the rule at issue here, that orders issued under delegated authority are both effective upon issuance and subject to further Commission review. The court held that

> the "effective but not final" procedure did not deprive appellant of the opportunity to challenge the assignment before the Commission and this Court. Rather, the procedure merely prevented appellant from insisting on the maintenance of the status quo pending review.[22]

The court also held that "as the Commission's rule represents a permissible construction of its organic statute, it is entitled to deference," and that there was "no reason to set aside a practice that has been in effect for more than a quarter of a century."[23] The Commission is entitled to the same deference here.

The Second Circuit recently denied an emergency stay on comparable facts.[24] Cablevision and an affiliated network challenged two Media Bureau orders requiring them,

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of this section whether or not there has been presented or determined an application [for an appeal to superior agency authority] . . . , unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative.").

22 *Committee to Save WEAM v. FCC*, 808 F.2d 113, 119 (D.C. Cir. 1986).

23 *Id.* at 114-115, 119. The Commission's rules make the HDO and Initial Decision immediately effective in order to implement a statutory directive, in this case Section 616 and its mandate for expedited review. *See* 47 U.S.C. § 536(a)(4). The Commission's interpretation of its statutory mandate and the applicable regulatory scheme is entitled to deference. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-44, 866 (1984); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). In enacting Section 616 (which emphasizes expedition) and the program carriage rules (which do the same), Congress and the Commission certainly were aware of the APA and its requirements; as Comcast itself says, government officials are presumed to know the law. Exceptions to Initial Decision, at 6 & nn.25-26 (Jan. 19, 2012) [hereinafter "Exceptions"].

24 *See Cablevision Systems Corp. v. FCC*, No. 11-4104, Order, Doc. 86, (2d Cir. Nov. 11, 2011).

under the program access rules, to license their programming services to two competing MVPDs, arguing based on the APA provision cited by Comcast that "the order under review should not go into effect during the pendency of [ongoing] administrative appeals."[25] The Commission's brief outlined why Cablevision's request for a stay was "foreclosed by the Commission's longstanding interpretation of the Communications Act – an interpretation that has been upheld by the D.C. Circuit," and it urged the court to reject Cablevision's attempt to "invoke[] the general principles governing the finality of administrative decisions under Section 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704" to avoid the immediate effectiveness of the delegated decisions of FCC officials.[26] Comcast has offered no reason why the reasoning of the Commission, and its acceptance by courts, should be ignored. Nor has it even acknowledged the Commission's clear stance on the issue and the deference to which that stance is entitled.[27]

Although Comcast frames its argument as relating to the Administrative Law Judge's authority, the legal consequence of the rule that it urges would be to fundamentally debilitate the Commission's conduct of its day-to-day business. Under Comcast's interpretation, *no* staff decision under delegated authority could become effective if a party sought review by the full Commission.[28] As Congress has recognized, the Commission must be able to delegate

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25 *Cablevision Systems Corp. v. FCC*, Emergency Request for a Stay Pursuant to the All Writs Act, Doc. 1, at 11 (Oct. 7, 2011).

26 *Cablevision Systems Corp. v. FCC*, Opposition of FCC to Emergency Request for a Stay Pursuant to the All Writs Act, Doc. 51, at 16-19 (Oct. 20, 2011).

27 The fact that the *WEAM* and *Cablevision* cases involved a bureau decision rather than an ALJ ruling is irrelevant, both because initial decisions are (like bureau decisions) subject to a statutory exhaustion requirement, and because an initial decision issued after extensive discovery and a full evidentiary hearing is entitled to at least as much weight and effectiveness as a bureau order.

28 *See, e.g.*, 47 C.F.R. § 1.102(b); *id.* § 76.10(c)(2).

many of the voluminous tasks under its purview to staff in order for the agency to function properly.[29] The APA cannot be read to require the Commission to grind to a halt so that the full Commission can vote on every action taken by the staff before it can become effective.[30]

II. THE FOUR-FACTOR STAY TEST UNDERSCORES THE NEED FOR PROMPT COMPLIANCE.

Comcast must satisfy a heavy burden to obtain a stay and thereby avoid compliance with the Commission's program carriage rules.[31] "Both the courts and [the] Commission have made it abundantly clear that a stay of an administrative action is not an automatic right. It is extraordinary relief and will be granted only where the movant can

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29 For this reason, the Communications Act provides that, "[w]hen necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by published rule or by order, delegate any of its functions." 47 U.S.C. § 155(c)(1) (excepting certain functions not applicable here). The ALJ's release of an initial decision after the issuance of an HDO is clearly an exercise of delegated authority. *See generally* 47 C.F.R. § 0.341(f).

30 Indeed, in a recent program carriage rulemaking, the Commission created a procedure for granting immediately effective temporary relief to networks, before their complaints have even been resolved or heard by an ALJ, in order to enforce Section 616. *Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage, Part III*, MB Docket No. 07-42, FCC 11-119, 76 Fed. Reg. 60652, ¶ 27 (Sept. 29, 2011). The Commission noted that "[t]he Supreme Court has affirmed the Commission's authority to impose interim injunctive relief . . . pursuant to Section 4(i) [of the Communications Act]." *Id.* ¶ 26 (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 181 (1968)); *see also* 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions."). The case for relief is even stronger here, since it follows a full hearing completed at the direction of the Commission and the Media Bureau's action on delegated authority.

31 As the moving party, Comcast has the burden of proof in support of its request. See *Game Show Network, LLC v. Cablevision Systems Corp.*, Order, File No. CSR-8529-P, 2011 WL 6096674, DA 11-1993, ¶ 10 (Dec. 7, 2011); *Amendment of Part 22 of the Commission's Rules*, Order, 8 FCC Rcd 5087, 5087 ¶ 2 (1993).

demonstrate [that it has satisfied four separate criteria]."[32] Specifically, Comcast must demonstrate that: (1) it is likely to succeed on the merits on review; (2) it would suffer irreparable injury absent a stay; (3) a stay would not substantially harm other interested parties; and (4) a stay would serve the public interest.[33] As the Commission has explained, "the test for a stay requires a balancing of all factors, and only when they are 'heavily tilted in the movant's favor' is the extraordinary relief of a stay appropriate."[34]

Comcast makes no effort to meet this standard, arguing with respect to the first element that it need only show that "a serious legal question is presented"[35] and that the issues raised "bear further analysis."[36] Longstanding Commission precedent is to the contrary,[37] and

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32 *Tropical Radio Telegraph Co. Authorization To Acquire and Operate One Satellite Voice Circuit for the Rendition of Record Services Between the United States and Italy and Beyond,* Mem. Op. & Order, 36 F.C.C.2d 648, 648 ¶ 3 (1972).

33 In determining whether to stay the effectiveness of one of its rules, the Commission uses the four-factor test established in *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified by *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). *See Time Warner Cable, A Division of Time Warner Entm't Company, L.P.*, Order on Reconsideration, 21 FCC Rcd 9016, ¶ 9 (2006).

34 *Implementation of Video Description of Video Programming*, 17 FCC Rcd. at 6177 ¶ 6.

35 Stay Petition at 8-9 (citing *Wash Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977)).

36 *Id.* (citing *Brunson Commc'ns, Inc. v. RCN Telecom Servs., Inc.*, 15 FCC Rcd 12883, ¶ 5 (2000)).

37 The Commission will not grant a stay unless the petitioner can show that success on appeal is "probable" — a threshold that Comcast cannot meet. *See Wash Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Indeed, in an analogous context Comcast itself has argued that the first criterion requires a showing of a "substantial" likelihood of success on the merits. *See* Comcast *Ex Parte* Letter, M.B. Docket No. 07-42, at 3 (July 25, 2011).

The line of case law that Comcast cites out of context instead stands for the proposition that the less strong a petitioner's chances for success on the merits, the *stronger* a showing the petitioner must make that "the balance of harms weigh in his favor." *Time Warner Cable, A Division of Time Warner Entm't Company, L.P.*, Order on Reconsideration, 21 FCC Rcd 9016, (continued...)

the fact that an issue might "bear further analysis" is a far cry from meeting the heavy standard that would warrant an order permitting Comcast to continue to engage in its discriminatory carriage of Tennis Channel.

A. Comcast Fails To Establish That It Is Likely To Succeed on the Merits.

Comcast cannot credibly argue that it is likely to prevail in defending its discriminatory carriage of Tennis Channel under Section 616. Comcast's Stay Petition simply resurrects arguments that the Media Bureau, Enforcement Bureau and the Chief Administrative Law Judge ("ALJ") explicitly rejected, generally without acknowledging, let alone addressing, the reasons why those arguments were rejected.[38] The Commission typically declines to find a probability of success on the merits where the merits arguments have already been fully addressed and decided[39]; here, after the Media Bureau made a *prima facie* finding of discrimination and rejected Comcast's time-bar defense, both the Presiding Judge and the Enforcement Bureau thoughtfully addressed the issues and explicitly found willful discrimination.

¶ 9 (2006) ("[T]he degree of harm that a petitioner must demonstrate varies with its chances for success on the merits. . . . '[t]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in this favor; the less likely he is to win, the more need it weigh in his favor.").

As described in Section II.B, *infra*, the relatively routine, cost-of-doing-business expenses that Comcast has cobbled together fail to meet even a minimum threshold showing of "irreparable harm," much less any sort of *heightened* standard.

[38] *See, e.g.*, HDO ¶¶ 11-16; Enforcement Bureau's Comments (July 8, 2011); Initial Decision ¶¶ 62-78, 102-04.

[39] *See APCC Services, Inc. v. Netwirkip, LLC*, Order, File No. EB-03-MD-011, DA 07-2079, 22 FCC Rcd 9080, 9083 ¶ 6 (2007) ("Most, if not all, of [the merits] arguments have already been fully addressed and decided in the Commission's *Orders*, and, after further careful consideration, we conclude that the Motion does not raise any basis — new or repeated — for believing that Network has a substantial likelihood of obtaining reversal or vacatur of any of the Commission's decisions in those *Orders*.").

1. Tennis Channel's Complaint Was Timely Filed.

Comcast's lead attempt to show a likelihood of success is not an actual merits argument; instead, Comcast leads with a procedural timeliness argument that is plainly at odds with the law and irrational in application. Specifically, Comcast asks the Commission to misapply the one-year time limit rule so as to allow Comcast (and presumably all other MVPDs) to discriminate freely at any point after the first year of a contract with an unaffiliated program service, and to do so with immunity from Section 616. This argument, along with its primacy in Comcast's Stay Petition, perfectly signals Comcast's broader inability to establish a likelihood of success on the merits.

As demonstrated more fully in Tennis Channel's opposition to Comcast's application for review of the HDO, and as the Media Bureau properly held, Tennis Channel's complaint was timely.[40] As required by the Commission's rules, the complaint was filed within a month of Tennis Channel's provision to Comcast of the requisite prefiling notice[41]; in other words, it was timely filed "within one year of the date on which . . . [a] party has notified [an MVPD] that it intends to file a complaint with the Commission based on violations of one or more of the [program carriage] rules."[42] The complaint also was filed less than a year after the

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40 *See generally* Opposition to Application for Review of Comcast Cable Communications, LLC (Feb. 6, 2012) [hereinafter "Opposition to Application for Review"]; HDO ¶ 11.

41 Program Carriage Complaint, ¶ 7 & Ex. 29 (Jan. 5, 2010) [hereinafter "Compl."]; *see also* 47 C.F.R. § 76.1302(b), (f)(3). Section 76.1302(f) has since been moved unaltered to Section 76.1302(h).

42 47 C.F.R. § 76.1302(f)(3); *see also Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable Inc., et al.*, Mem. Op. & Hearing Designation Order, 23 FCC Rcd 14787, ¶¶ 38, 70, 105 (2008) [hereinafter "*Omnibus HDO*"]. Subsection (f)(1) of the rule, requiring complainants to bring their claims within one year of the execution of a contract, is not applicable here. Comcast argues that Tennis Channel's "one-year window opened in 2005, when it entered its still-operative carriage agreement with Comcast." Stay Petition at 10. However, as has been clear (continued...)

act of discrimination about which Tennis Channel complains — Comcast's June 9, 2009 denial of Tennis Channel's request for expanded carriage, following Tennis Channel's presentation of a clear case of improvements putting the network at or above the level of Golf Channel and Versus — further confirming the timeliness of the complaint under governing precedent.[43]

Comcast advances an unsupportable contrary reading of the time-limit rule that would require any claim relating to a contract to be brought within one year of signing the contract, regardless of how much later during the term of the contract the actual discrimination occurred, or when the demand for fair carriage took place. This misreading of the rule would imperil the very networks Section 616 seeks to protect. In Comcast's view, whenever a new network enters into a carriage agreement affording the distributor tiering flexibility (to allow the network's distribution to improve as it develops), the distributor could (as Comcast has done here) refuse to expand the network's distribution or engage in any other form of predatory behavior after the first year of the contract, without regard to the network's improvements and even as it gives its similarly situated affiliated services better treatment for the purpose of protecting them against the new network's competition. Comcast would render a network in this situation without remedy under Section 616; if the network sues in the first year, the distributor

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since the outset of this case, and as the Media Bureau found, Tennis Channel is not challenging the terms of the 2005 affiliation agreement. *See, e.g.*, Reply ¶¶ 61, 64 (Mar. 23, 2010). Comcast has offered no plausible reason why Tennis Channel would have [redacted], and it has utterly failed to confront the fact that Tennis Channel is [redacted] based on developments that occurred after the date of the documents upon which Comcast relies. More importantly, the law does not permit a distributor to discriminate at will simply because it has a contract that gives it carriage discretion. *See* Opposition to Application for Review, at 3-4.

[43] *See* HDO ¶¶ 11-16; *Omnibus HDO* ¶¶ 69-70, 102-105; *see also* Compl. ¶¶ 51-52; Reply at 3-4; Solomon Written Direct ¶ 28; Comcast Ex. 78, Gaiski Written Direct ¶ 17; Bond Tr. at 2128:1-14, 2215:9-11; Gaiski Tr. at 2413:1-16.

could be expected to claim that the network had not developed enough to be treated in the same way as affiliated networks receiving broader carriage, and if it waits until it had achieved significant growth, it would, in Comcast's view, have waited too long. Barring a network's claim as inevitably either too early or too late would "frustrate enforcement of the statute and rules" and is not the law.[44]

Unable credibly to challenge the merits of the Media Bureau's timeliness ruling, Comcast claims that it was prevented by the Media Bureau's HDO from presenting evidence that would have been relevant to the timeliness issue, in violation of its due process rights.[45] But due process in these circumstances simply requires notice and an opportunity to be heard.[46] Comcast was aware of the precedents governing timeliness and raised the argument before the hearing designation in its pleadings to the Media Bureau; indeed, it specifically requested in its Answer that the Media Bureau rule on the question of timeliness and attached to its Answer declarations and documents (among nearly forty exhibits) that addressed the timing of the parties' negotiations.[47] It thus had ample opportunity to be heard on the timeliness issue. The Media Bureau considered Comcast's argument on the basis of the pleadings, and it rejected Comcast's

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[44] *Omnibus HDO* ¶ 70; *see also id.* ¶ 72 ("Whether or not Comcast had the right to [make a particular tiering decision] pursuant to a private agreement is not relevant to the issue of whether doing so violated Section 616 of the Act and the program carriage rules. Parties to a contract cannot insulate themselves from enforcement of the Act or our rules by agreeing to acts that violate the Act or rules.").

[45] *See* Opposition to Tennis Channel's Petition to Compel Comcast's Compliance with Initial Decision at 12-14. This argument in reality is an appeal from the HDO and should have been raised in Comcast's application for review of the HDO. In the event that the Commission chooses to consider it, Tennis Channel address it here.

[46] *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970); *see also Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 205 (D.C. Cir. 2001) (due process is a flexible standard that depends on the situation).

[47] *See* HDO ¶¶ 11-16; *see also* Comcast Answer ¶¶ 30-37 & Exs. 1, 14, 18.

theory as a matter of law.

Comcast's attempt to argue new evidence — evidence that simply shows that Tennis Channel was aware of the Commission's ongoing program carriage rulemaking proceeding and its rights under the existing rules to receive fair carriage, but that it first sought to fully build its network to achieve that carriage through negotiations[48] — does nothing to impugn the Media Bureau's ruling. It certainly does not support a Due Process argument.[49]

2. The Initial Decision Applies The Correct Legal Framework To Find Discrimination in Violation of Section 616.

It is perhaps unusual for the Commission to have available for its review in a stay context each party's complete statement of its position regarding the merits of the decision subject to appeal. Here, however, both Comcast's Exceptions and Tennis Channel's Reply to Comcast's Exceptions are before the Commission, and the record is thus complete on that subject. Tennis Channel incorporates its Reply to Comcast's Exceptions herein and will limit

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[48] Comcast claims that it "first discovered" relevant evidence after the HDO issued. Opposition to Tennis Channel's Petition to Compel Comcast's Compliance at 13-14. Comcast also argues that testimony and documents adduced at trial established that Tennis Channel was ready to bring a case under Section 616 at least a year before it actually did so, and that it should not be precluded from using that evidence to challenge the Media Bureau's holding. *See id.*; Solomon Tr. 269:20-271:6; Comcast Exs. 24, 125, 126, 136, 137, 271, 522, 626. The documents and testimony excerpts upon which Comcast relies in making this argument do not establish that Tennis Channel delayed bringing a program carriage claim. They simply indicate that Tennis Channel made a business case to Comcast once it had made significant programming acquisitions and other improvements, and that Tennis Channel was aware of the relevant regulatory framework. *See* Opposition to Application for Review, at 4-5 & n.18.

[49] Due process does not require additional and unnecessary procedures, particularly where, as here, the facts are clear and the result is compelled as a matter of law. *See generally Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Nat'l Council of Resistance of Iran*, 251 F.3d at 209. Courts, of course, routinely resolve statute of limitations questions on the basis of the complaint alone, the full set of pleadings, or the pleadings plus written evidence. *See* Fed. R. Civ. P. 8, 12, 56; *see also* Fed. R. Civ. P. 56(a).

itself in this Opposition to a brief restatement of some of the key points establishing why Comcast cannot claim any likelihood of success on the merits.

As explained more fully in Tennis Channel's Reply to Comcast's Exceptions, Comcast's critiques of the Initial Decision have little to do with the factual record in this case or with the Presiding Judge's careful application of the law to that record. Instead, Comcast takes issue with the statute itself, offering an interpretation of Section 616 under which no set of facts would ever be sufficient to show discrimination. That Comcast disagrees with Congress's judgment to adopt Section 616 provides no justification for staying effectiveness of the Initial Decision.[50] Under a fair application of Section 616, Tennis Channel satisfied each element of the statute.

Tennis Channel, Golf Channel, and Versus Are Similarly Situated. The Presiding Judge correctly concluded that "Tennis Channel, Golf Channel, and Versus are similarly situated networks."[51] As demonstrated in Tennis Channel's Reply to Comcast's Exceptions, which contains a more extended discussion of the relevant factors and Comcast's objections, this conclusion was clearly correct.[52] The networks' similarity is apparent from their nature — they are all "national cable networks," offering "the same *genre* . . . of programming" in the "year-round sports" programming category.[53] "Tennis Channel and Golf Channel each are devoted to

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50 *See generally* Reply to Exceptions, Sections I.A, I.B, I.C.2 (outlining flaws in Comcast's efforts to nullify Section 616) (Feb. 6, 2012).

51 Initial Decision ¶ 24; *see also id.* ¶¶ 24-52, 106.

52 *See generally* Reply to Exceptions at Section I.B.

53 Initial Decision ¶ 25; Brooks Tr. at 703:5-1; *see generally* Reply to Exceptions at Section I.B.1.

the broadcast of a single sport with 'high levels of audience participation.'"[54] And Tennis Channel and Versus "have a history of sharing or seeking rights to the same sporting event that continues to the present."[55]

Moreover, the Presiding Judge found additional, significant similarities.[56] The three networks "attract[] similar types of viewers": affluent adults with a skew toward males.[57] They also "target the same advertisers,"[58] a conclusion Comcast does not challenge before the Commission. As the record established, in 2010, [redacted] of Golf Channel's revenue from its 30 largest non-endemic advertisers, and [redacted] of Versus's, came from companies that had recently either purchased or considered formal proposals for purchasing advertising on Tennis Channel[59]; moreover, out of Tennis Channel's 30 largest advertisers in 2010, [redacted] advertised on Golf Channel that year, and [redacted] advertised on Versus.[60] The Presiding Judge also found, based on a "systematic ratings comparison of the three channels" by Tennis Channel's media expert, that the three networks "have remarkably similar ratings" among viewers who can receive all three.[61] Comcast did not counter this proof of ratings similarity with any ratings evidence of its own.

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54 Initial Decision ¶ 25 (quoting Singer Written Direct ¶ 28).

55 *Id.* ¶ 26.

56 *See generally* Reply to Exceptions at Sections I.B.2 - I.B.5.

57 Initial Decision ¶¶ 24, 37-39, 42.

58 *Id.* ¶¶ 24, 40, 45-47, 106

59 *Id.* ¶ 45; *see also* Tennis Channel Ex. 15, Herman Written Direct ¶¶ 8-9 & Ex. B.

60 Initial Decision ¶ 46; *see also* Herman Written Direct ¶ 10 & Ex. C.

61 *Id.* ¶¶ 48-49.